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OPINION

Title IX regulations impose new requirements on K-12 districts

A former Illinois executive inspector general writes that K-12 school districts will need to make substantial changes to how they address sexual harassment.

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Maggie Hickey is a former Illinois inspector general and a partner at Schiff Hardin LLP whose team worked with Chicago Public Schools to address sexual misconduct against students. At Maggie's recommendation, CPS created an Office of Student Protections and Title IX, which investigates allegations of student-on-student sexual misconduct, ensures victims of sexual misconduct receive support services, and collects and reports data regarding sexual misconduct. Anthony-Ray Sepúlveda and Mariam Chamilova are associates at Schiff Hardin.

On May 6, the U.S. Department of Education released new Title IX regulations that establish how education programs that receive

federal funding must respond to sex discrimination, including sexual harassment. A lot has been written about how the new rules apply in college classrooms, parties and dormitories, but the new regulations also apply to elementary school playgrounds and high school sports programs. In fact, the regulations detail specific minimum responsibilities and requirements that apply to kindergarten through 12th grade.

Although some of the requirements are not new, this is the first time many requirements are explicitly stated in the regulations, so they may seem new to K-12 districts. As a result, many K-12 districts will need to make substantial changes to how they address sexual harassment.

As districts consider timelines to reopen after COVID-19, they should also focus on complying with these requirements, which include staffing positions, knowing the district's scope of responsibility, creating policies, responding to and investigating complaints, and training on all these topics.

With three months until the new requirements take effect, schools should do the following:

Designate qualified personnel

Before the changes, districts were already required to have a "Title IX Coordinator" lead compliance efforts. Now the regulations require districts to designate additional positions, including investigators and decision-makers. The regulations specify decision-makers cannot be the same person as the Title IX Coordinator or an investigator.

Prepare for broader response obligations

When a district has actual knowledge of sexual harassment, the new regulations prohibit districts from responding in a manner that is “clearly unreasonable in light of the known circumstances.” A K-12 district has “actual knowledge” when *any* employee has notice of sexual harassment or allegations of sexual harassment (unless that employee is the accused).

While many states already have mandatory reporting statutes for districts, the new Title IX regulations essentially make reporting a federal requirement. As a result, districts should consider training all employees even though the regulations do not explicitly require it.

Once a district’s response obligations are triggered, the Title IX Coordinator must promptly contact the complainant to discuss supportive measures, consider the complainant’s wishes regarding supportive measures, and explain the process for filing a formal complaint.

The new regulations also require districts to offer supportive measures — including counseling, contact restrictions, and modification of class schedules — to complainants. Additionally, districts must follow a grievance process before imposing any discipline or non-supportive measures against the accused. But districts may place accused non-student employees on administrative leave while a grievance process is pending.

The regulations also expressly recognize the legal rights of parents and guardians to act on behalf of students in Title IX matters. Therefore, students’ parents or guardians may make decisions regarding appropriate supportive measures or whether to file or

withdraw a formal complaint.

Know the district's new scope of responsibility

The new regulations specify the district's responsibilities and when districts *must* dismiss formal complaints. After receiving a formal complaint, districts must conduct a formal investigation or, in limited circumstances, offer an informal resolution process.

Likewise, districts *must dismiss* a formal complaint if 1) the conduct would not constitute sexual harassment, under the new definition, or 2) if the conduct did not occur in a district's function or 3) in the United States. If the district dismisses the formal complaint, it may still take action under its code of conduct.

The district may dismiss a complaint if 1) the complainant notifies the Title IX Coordinator, in writing, that the complainant would like to withdraw, 2) if the accused is no longer enrolled or employed by the district, or 3) if the specific circumstances prevent the district from gathering sufficient evidence to determine responsibility.

The new regulations list factors that districts should consider in making the decision, including whether the accused might pose an ongoing risk to the district's community. Nonetheless, it is unclear whether or how the new regulations address K-12 personnel who commit sexual harassment and may attempt to avoid consequences by changing districts.

Know the new investigative requirements

The new regulations codify additional investigative requirements. For example, before the completion of the investigative report, the

district must send evidence to each party, and the parties must have at least 10 days to submit a written response.

Next, the investigator must create an investigative report and send the report to each party for review and written response, at least 10 days before the hearing or before the district's determination regarding responsibility.

K-12 school districts may, but need not, hold live hearings. Even without a live hearing, however, the district's decision-maker must allow each party to submit written questions, provide each party with the answers, and allow for additional follow-up questions before determining responsibility.

The new regulations also specify the district has the burden of proof. Further, while districts may now choose between the "preponderance of the evidence" or the "clear and convincing evidence" standard, the regulations specify districts must select the standard in advance and apply the same standard to all formal complaints, for both accused students and employees.

Prepare for the new training requirements

Before the changes, Title IX already required districts to train certain personnel on the law. The new regulations, however, identify new training topics for certain designated personnel, including on the regulation's *new* definition of sexual harassment and how to serve impartially.

Moreover, districts must now train decision-makers on how to conduct live hearings — including what questions and evidence are relevant — and train investigators on how to create an investigative report that fairly summarizes relevant evidence. Districts must also

make all training materials publicly available.

Overall, the new regulations increase the obligations K-12 districts have for addressing sexual harassment. The stakes are high: The Department of Education can require schools to prove their compliance with Title IX and withhold federal financial assistance for non-compliance, regardless of whether they have made any finding of sexual harassment.